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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Kendra Rightsell,

10 Plaintiff,

11 v.

12 Concentric Healthcare Solutions LLC, et al.,

13 Defendants.

No. CV-19-04713-PHX-GMS

ORDER

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15 Pending before this Court are: (1) Plaintiff's Motion for Attorneys' Fees and Non-
16 Taxable Expenses (Doc. 188); (2) Plaintiff's Supplement to and Renewed Motion for
17 Attorneys' Fees and Non-Taxable Expenses (Doc. 199); Plaintiff's Motion to Amend
18 Findings of Fact and to Amend Judgment by Plaintiff Kendra Rightsell (Doc. 205) and
19 Defendants Concentric Healthcare Solutions, LLC's, Silk and Bollinger's Motion to Alter
20 or Amend Judgment (Doc. 206). For the following reasons, both parties' Motions to
21 Amend (Docs. 205 and 206) are denied and Plaintiff's Motion for Attorney's Fees
22 (Doc. 188) is granted. As is further explained below, Plaintiff is awarded \$259,667.60 in
23 fees and \$14,666.31 in non-taxable costs for a total of \$274,333.91.

24 **Plaintiff's Motion to Amend Judgment (Doc. 205)**

25 Plaintiff moves the Court to amend its findings and judgment pursuant to both Fed.
26 R. Civ. P. 52 and 59. As Plaintiff notes, the consensus is that "[p]arties should not use a
27 Rule 52(b) motion to relitigate issues previously decided or introduce new theories, but
28 rather to correct 'manifest legal or factual errors' or to present newly discovered evidence."

1 *Peyre v. McGarey*, CV-23-090350-PHX-DWL, 2023 WL 4351544 at * 1 (D. Ariz. July 5,
 2 2023). “Rule 52(b) motions are appropriately granted in order to correct manifest errors
 3 of law or fact.” *Ollier v. Sweetwater Union Hight Sch. Dist.*, 858 F. Supp.2d 1093, 1117
 4 (S.D. Cal. 2012). Similarly Rule 59(e) motions “should not be granted, absent highly
 5 unusual circumstances, unless the district court. . . committed clear error.” 389 *Orange*
 6 *Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

7 Plaintiff does not meet either standard here. The Defendants met their burden of
 8 proof in establishing by a preponderance of the evidence that Plaintiff failed to mitigate
 9 her damages after December 31, 2018.¹ *Bell v. VF Jeanswear LP*, No. CV-14-01916-PHX-
 10 JJT, 2018 WL 1034952 at *7 (D. Ariz. Feb. 23, 2018), *aff’d*, 819 F. App’x 531 (9th Cir.
 11 2020) (holding that the preponderance of evidence standard applies to a mitigation
 12 defense). Often, they did so through Plaintiff and her own witnesses. After the Court heard
 13 the evidence on damages and the parties submitted their closing arguments via written
 14 brief, the Court made its findings of fact (Doc. 193) and thereafter entered judgment
 15 (Doc. 195). Both parties acknowledge that the award of back pay or front pay is an
 16 equitable remedy for the Court to decide. In making such an award, “Congress could not
 17 have been more explicit in leaving the relief to the equitable discretion of the court, to be
 18 determined in light of all relevant facts and circumstances.” *Franks v. Bowman Transp.*
 19 *Co., Inc.*, 424 U.S. 747, 789 (1976 Burger, C.J., concurring). In considering the relevant
 20 facts and circumstances the Court is allowed to consider the reasonable inferences that arise
 21 from the facts. Despite Plaintiff’s allegations to the contrary, each of the Court’s

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 23 ¹ In its ruling on the damages issue this Court somewhat carelessly quoted *Odima v. Westin*
 24 *Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995) which itself somewhat carelessly quoted
 25 *E.E.O.C. v. Farmers*, 31 F.3d 891, 906 (9th Cir. 1994) that was determining whether a
 26 Defendants had established the defense of failure to mitigate on summary judgment.
 27 EEOC stated “to prevail on its motion for summary judgment, Farmer Bros. had to prove
 28 that, based on undisputed facts in the record, during the time in question there were
 substantially equivalent jobs available, which Estrada could have obtained, and that she
 failed to use reasonable diligence in seeking one.” Of course, to achieve summary
 judgment, material facts must be undisputed. Such facts need not be undisputed, however,
 for the finder of fact to make a conclusion with respect thereto after trial. Thus, while the
Odima holding is an obvious and correct statement of the law as it applies the summary
 judgment standard to pre-trial factual determinations, it is not the standard for making
 findings post-trial.

1 challenged findings is based upon testimony and evidence or reasonable inferences drawn
2 therefrom, and the equitable relief is appropriately explained and tailored to those facts and
3 circumstances. For example, in Plaintiff's testimony she testified that she expected her
4 commissions at Funding Well to grow although it would be "a longer wait time" than
5 initially expected. (Doc. 155 at 509:7-10). Further Plaintiff's expert testified that
6 employment on a salary plus commission basis that there was the opportunity for an
7 increase in pay. (Doc. 184 at 1068:25-1069:2). In any event, the Court awarded Plaintiff
8 the difference between her salary plus commission at Concentric and her salary plus
9 commission at Funding Well until Plaintiff voluntarily left Funding Well. It thus did not
10 find, that her Funding Well employment was the immediate remunerative equivalent of her
11 employment at Concentric. It did determine that it would become so. However, when
12 Plaintiff voluntarily left Funding Well after a short period of employment and before
13 having any replacement job, the Court found that Plaintiff did so as a matter of personal
14 preference, and that from the standpoint of an obligation to mitigate damages it was not
15 reasonable.

16 In so doing the Court considered Plaintiff's reasons for leaving Funding Well, and
17 found that while they may have been understandable from the point of view of personal
18 choice and convenience, they were not consistent with her obligation to mitigate damages.
19 This was especially so when she left Funding Well before having replacement employment,
20 and, when she finally accepted replacement employment, it was at a job that was not the
21 substantial equivalent of her job at Concentric although such jobs were available. *Sangster*
22 *v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980) (Holding that an employee that
23 "voluntarily quit[s] alternative employment without good reason" has accepted a "willful
24 loss of earnings.") The availability of other equivalent employment in the area was
25 confirmed by Plaintiff's own expert. Further, despite her lack of a driver's license, public
26 transportation was reasonably available, as Plaintiff herself acknowledged. Plaintiff had
27 been reimbursed for the temporary loss of FMLA benefits in the damages award, and
28 FMLA benefits are not available with a new employer for a year. Plaintiff did not testify

1 she was hindered in her ability to find alternate employment because of COVID, and in
2 any event, to the extent the Plaintiff now offers it as a post-hoc justification, the viral
3 disease was not yet present in the human population at the time. (Doc. 193 at 3-4).

4 Further in adopting Plaintiff's 2017 earnings as well as the percentage amount to be
5 added to her earnings to represent employment benefits, as well as applying a discount rate
6 in determining the basis of the backpay awarded, the Court adopted the opinion provided
7 by Plaintiff's own expert and argued by Plaintiff in her written closing argument on
8 damages. Nor did the Plaintiff make any specific request for compound interest. Rather,
9 Plaintiff requested that an interest award be made consistent with the attachments to its
10 written closing arguments. (Doc. 186 at 16). While those attachments did break out an
11 amount for interest on backpay, they did not indicate that the interest amount was
12 compounded annually (if in fact it was). Because all of the attached amounts pre-computed
13 by Plaintiff requested exaggerated damage amounts, they were not used by the Court. The
14 Plaintiff did not alert the Court that she sought, or that she was entitled to compound
15 interest until her REPLY brief on the present motion to amend pleadings. Finally, in her
16 Reply to the Motion to Amend Pleadings, Plaintiff identifies a statute which indicates that
17 compound interest is the norm in federal litigation. But she neither sought compound
18 interest, nor cited the Court to the statute prior to the award. Thus, Plaintiff has an
19 insufficient basis upon which to argue that the Court committed "manifest" or "plain" error
20 based on the simple interest awarded. Finally, the Court did not find that Plaintiff was
21 entitled to any other equitable relief than it awarded. Plaintiff still has not established her
22 entitlement to such relief. She acknowledged that reinstatement was not a practical
23 remedy, nor did she establish to the Court's satisfaction that Defendants were engaged in
24 systematic conduct that violated the FMLA or that needed to be enjoined. Plaintiff's
25 Motion to Amend Findings of Fact and Judgment (Doc. 205) is, therefore, denied.

26 **Defendants' Motion to Alter or Amend Judgment**

27 Defendants' Motion to Alter or Amend Judgment (Doc. 206) is also denied. It was
28 not timely submitted. The Court is not inclined to alternatively consider the motion as a

1 Rule 60 Motion since Defendants raise Rule 60 for the first time in its Reply. But even if
 2 the Court did so, the argument provides no basis for relief. It is not appropriate to instruct
 3 the jury on the McDonnell-Douglas burden shifting analysis at trial. *Costa v. Desert*
 4 *Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (“Regardless of the method chosen to arrive
 5 at trial, it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting
 6 framework to the jury.”).

7 **Plaintiff’s Motion for Attorney’s Fees (Doc. 188)**

8 Plaintiff is entitled to an attorneys’ fee award under 29 U.S.C. § 2617(a)(3) (“[t]he
 9 court . . . shall, in addition to any judgement awarded to the plaintiff, allow a reasonable
 10 attorney’s fee, reasonable expert witness fees, and other costs of the action to be paid by
 11 the defendant.”). “[T]he most critical factor’ in determining a reasonable fee ‘is the degree
 12 of success obtained.’” *Marek v. Chesney*, 473 U.S. 1, 11 (1985) quoting *Hensley v.*
 13 *Eckhart*, 461 U.S. 424, 436 1983); *Ambat v. City & County of San Francisco*, 757 F.3d
 14 1017, 1032 (9th Cir. 2014) quoting *McCown v. City of Fontana*, 565 F.3d 1097, 1103 (9th
 15 Cir. 2008), (holding that “the district court should adequately explain the reasonable
 16 number of hours and hourly rate it uses in calculating the fee, and appropriately adjust the
 17 award to account for [a plaintiff’s] limited success on claims and damages, and for any
 18 public benefit derived from his suit.”)

19 The parties dispute both the hourly rates that should be awarded to Plaintiff and the
 20 number of hours that are reasonable. The rate to be applied is “the fees that private
 21 attorneys of an ability and reputation comparable to that of prevailing counsel charge their
 22 paying clients for legal work of similar complexity.” *Welch v. Metropolitan Life Ins. Co.*,
 23 480 F.3d 942, 946 (9th Cir. 2007) – or in other words the prevailing market rate for paying
 24 clients. *Carson v. Billings Police Dep’t*, 470 F.3d 889, 891. (9th Cir. 2006). While
 25 Plaintiff’s counsel indicates what his billing rates are in his affidavit², he does not indicate

26 ² Mr. Bonnett states that his rate, and Ms. Martin’s were “billed at our senior partner rate
 27 of \$695 per hour,’ Ms. Kroll’s rate was billed at their junior partner rate of \$575/hour, that
 28 Ms Murphey, Mr. Davis and Ms. Carrier’s time that was billed at “our associate rate of
 \$395/hour” and that four of the firm’s paralegals billed at “our paralegal rate” which began
 at \$125/hour and during the litigation was raised to \$130/hour. He avows that he is familiar
 with the billing rates of practitioners in his field in Phoenix, and that the fees he seeks are

1 in the affidavit that such rates are rates that he charges to and receives from paying clients.³
 2 Neither does either of the respected lawyers that write affidavits on counsel's behalf
 3 indicate that the billing rates they discuss actually represent the market rate—or the billing
 4 rate actually charged to paying clients. As Defendants point out, the billing rate suggested
 5 by Plaintiff's counsel is not necessarily the market rate. "Because Martin & Bonnett
 6 focuses its practice on representing employees in cases where fee-shifting statutes
 7 apply, . . . Martin & Bonnett, PLLC can bill at any rate that it believes will be awarded by
 8 the Court. Put another way, Plaintiff's counsel's "current hourly billing rates" are not rates
 9 that it could charge to parties (including defendants) in a free market who would pay it."

10 The Court is persuaded, however, that very few if any attorneys would be willing to
 11 represent Plaintiffs to bring a meritorious claim to judgment, if they could only be
 12 reimbursed what an employee plaintiff would be able to pay. Therefore, the relevant
 13 market is not necessarily what the lawyer would charge Plaintiffs in employment cases
 14 who were paying their own attorney's fees. Rather, the Court applies the current hourly
 15 billing rates that experienced lawyers with an employment law specialization would charge
 16 in a free market to Defendants or others who could pay for such services such as when such
 17 lawyers are hired as mediators/arbitrators in settlement cases.

18 Ms. Larson in her affidavit states that "Phoenix employment attorneys, many with
 19 30+ years of experience, specialized training and certifications in alternative dispute
 20 resolution, and/or experience, as judges or judges pro tem, charge between \$325.00 and
 21 \$600.00 per hour to serve as a mediator or arbitrator." Although Mr. Schleier in his
 22 affidavit does not specify that the billing rates to which he opines are rates that are actually
 23 paid by a client capable of doing so, he does indicate typical "billing rates" for attorneys
 24 who are within the range of Mr. Bonnett's experience and quality range. Those rates --
 25 well within the range of those rates. But he does not specify that these billing rates are the
 26 rates charged to paying clients. And, neither of the attorneys who submit affidavits on
 27 behalf of Plaintiff do so either.

28 ³ At oral argument Plaintiff's counsel avowed that he does charge and receive that rate for
 some engagements, but ultimately, in fairness the Court makes its determination on the
 written briefings to which Defendants had a chance to respond. The amount awarded, the
 Court believes, constitutes a market rate.

1 from \$450.00 to \$700.00 per hour and \$250.00 to \$400.00 for less experienced attorneys—
2 have substantial overlap with the rates indicated by Ms. Larson. Similarly, Mr. Petitti
3 opines that “the prevailing range of hourly rates for lawyers of comparable experience and
4 reputation of those in Mr. Bonnett’s law firm, as he has outlined in his Declaration is
5 \$395.00-\$695.00 and \$130.00 or more for paralegal/legal assistant time.”

6 Mr. Bonnett is an experienced and skilled litigator and deserves to be paid at or
7 close to the top of the market rate. The top market rate that the Court can infer from the
8 affidavits is \$600.00 per hour. While Ms. Kroll is also a skilled brief writer, and may have
9 other abilities and experience, the Court, after examination and consideration of her role in
10 this litigation, is persuaded that the billable rate submitted is in excess of the market rate
11 for the tasks she performed on this case. The appropriate market rate for the services she
12 provided is \$375.00 per hour. The market rate for the experience and tasks performed by
13 Ms. Carrier is \$350.00 per hour, for Ms. Murphey is \$250.00 per hour, and Mr. Davis at
14 \$225.00 per hour. The paralegal/legal assistant rates charged by Martin & Bonnet are
15 appropriate.

16 In arriving at a reasonable fee, the most critical factor is a consideration of the
17 outcome achieved. As the Court in *Marek* noted “prevailing at trial ‘may say little about
18 whether the expenditure of counsel’s time was reasonable in relation to the success
19 achieved.’” *Id.* at 11 quoting *Hensley*, 461 U.S. at 436. The *Marek* case went on to note
20 “In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—
21 although technically the prevailing party—has not received any monetary benefits from the
22 postoffer services of his attorney.” *Marek* at 11. “Congress has not authorized an award
23 of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever
24 conscientious counsel tried the case with devotion and skill.” *Hensley*, 461 U.S. at 436.
25 As *Marek* further notes “This case presents a good example: the \$139,692 in postoffer
26 legal services resulted in a recovery \$8000 less than petitioners’ settlement offer. Given
27 Congress’ focus on the success achieved, we are not persuaded that shifting the postoffer
28 costs to respondent in these circumstances would in any sense thwart its intent under

1 §1988.” *See also, Moriarty v. Svec*, 233 F.3d 955, 967 (7th Cir. 2000) (holding that
2 attorney’s fees accrued after a settlement offer has been made that equals or exceeds the
3 total damages recovered by the prevailing party may be adjusted to reflect that the fees
4 provided after the offer of judgment were not “reasonable.”) , *Isom v. JDA Software Inc.*,
5 225 F. Supp. 3d 880, 888-89 (D. Ariz. 2016).

6 Plaintiff was awarded judgment in the amount of \$65,229.96. On March 4, 2023,
7 the eve of the original trial date, Plaintiff offered to settle the case for \$495,000.00 with
8 \$295,000.00 apportioned as attorney’s fees and costs and \$200,000.00 to Plaintiff.
9 Defendants counteroffered at \$100,000.00 inclusive of attorney’s fees and costs to settle
10 the case. On July 7-8, 2023, the eve of the second trial date, the parties again had settlement
11 discussions. Plaintiff rejected Defendants’ \$100,000.00 offer and offered to settle at
12 \$485,000.00. At the end of these final negotiations Plaintiff had lowered its offer to settle
13 to \$400,000.00. Plaintiff had increased its offer to \$200,000 inclusive of attorneys’ fees
14 and costs. Plaintiff did not accept this offer. Pursuant to the terms of her fee agreement
15 with her law firm, Plaintiff would have ultimately received greater recoveries had she
16 settled the case pursuant to either settlement offer. (Even assuming that failure to award
17 annual compound interest constituted plain error, (a proposition that the Court rejects) no
18 such interest would have accrued had Plaintiff accepted her first settlement offer.)⁴

19 As in *Marek* then, Plaintiff received no benefit from the post-settlement offer
20 services rendered to the Plaintiff after March 4, 2023. At any event, after that date there
21 was much duplication of services that occurred due to trial being postponed at the last
22 minute on March 8.

23 On the other hand, however, Plaintiff received a jury award for her FMLA claim
24 that was not insubstantial. She was thus entitled to recover on her claim, and she received
25 no settlement offers that would have allowed her to recover the amount of her claim short
26 of trial until the eve of the first trial date. She is thus, entitled to recover the reasonable

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28 ⁴ Further, because Plaintiff’s Supplement to and Renewed Motion for Attorney’s Fees and
Non-Taxable Expenses (Doc. 199) seeks awards of fees and expenses incurred after she
declined her settlement offer, the Court awards none of those amounts.

1 amount of attorneys' fees incurred by her counsel up to that point. The Court has reviewed
2 the billing provided by the Plaintiff to determine whether there are fees within that period
3 that should not be awarded, or other appropriate reductions made. Being mindful that the
4 Plaintiff's counsel have already done some redacting of requested payment, the Court has
5 examined the entries as set forth by Defendants in their Response to Plaintiff's request for
6 fees, e.g., Doc. 197-5, and has determined, for the most part, that the entries provide
7 sufficient detail and do not demonstrate excessive conferences or billing. The initial
8 lodestar amount is \$265,896.50 (340.8 hours from Mr. Bonnett at \$600.00 per hour, 83.8
9 hours from Ms. Kroll at \$375.00 per hour, 47.6 hours from Ms. Murphey at \$250.00 per
10 hour, 5.6 hours from Mr. Davis at \$225.00 per hour, 3.7 hours from Mirra Carrier at
11 \$375.00 per hour and 118.8 hours from the paralegals at \$130.00 per hour.)

12 Nevertheless, there are several entries that are excessive duplicative or unmerited.
13 There are also some instances of block-billing that merit some reduction. 1.8 hours of Mr.
14 Bonnett's time were excessive or duplicative (the billing entries for 7/15/19, 9/6/19,
15 5/14/20, 2/7/23), that 7.3 hours of Ms. Kroll's time were excessive or duplicative (7/15/22,
16 9/2/22, 11/29/22 2/2/23, 2/11/23) that 5.1 of Jennifer Murphey's hours were excessive or
17 duplicative (3/27/20, 11/30/20, 11/22/21). Paralegal time (KP, LS) that was excessive or
18 duplicate amounts to 5.0 hours (12/13/19; 9/21/22, 9/22/22, 1/24/23).

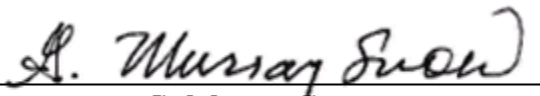
19 Further there were instances of block billing for which a 30% reduction is made.
20 They include instances of block billing of 1.6 hours by Mr. Bonnett (6/21/19, 12/10/19),
21 3.6 hours by Ms. Murphey, 1.0 hours by Mr. Kroll, and 8.1 hours (8/31/20, 2/4/21, 4/27/21,
22 11/10/22, 12/29/22 and 2/23/23) by paralegal KP. These amounts should also be deducted
23 from the lodestar. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).
24 As previously mentioned, this Court would also have deducted the duplication in services
25 that necessarily resulted from the postponement of the March 7 trial date necessitated by
26 Counsel's illness. But these amounts are not deducted because the amounts accrued post
27 March 4, 2023 are deducted from the lodestar at any rate, because they did not amount to
28 any benefit for Ms. Rightsell.

1 In costs, Plaintiff is awarded \$6,189.62 for her e-discovery vendor, and adjusted
2 costs granting other allowable costs accrued prior to March 4, 2023. Those amounts
3 include: \$77.00 in delivery costs, \$1,244.96 in copy costs, \$1,544.98 in online legal
4 research services, \$83.95 for the transcript of the final pretrial conference, \$4,000.00 for
5 the expert services of Bradford H. Taft, \$1,500.00 for the expert services of Dr. John
6 Buehler, and \$25.80 in UPA overnight expenses. The awardable non-taxable costs
7 total \$14,666.31.

8 **IT IS THEREFORE ORDERED** denying (1) Plaintiff's Motion to Amend
9 Judgment (Doc. 205) and Defendants' Motion to Alter or Amend Judgment (Doc. 206) and
10 (2) Plaintiff's Supplement to and Renewed Motion for Attorneys' Fees and Non-Taxable
11 Expenses (Doc. 199).

12 **IT IS FURTHER ORDERED** granting Plaintiff's Motion for Attorney Fees
13 (Doc. 188). Plaintiff is awarded \$259,667.60 in fees and \$14,666.31 in non-taxable costs
14 for a total of \$274,333.91.

15 Dated this 1st day of April, 2024.

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17 G. Murray Snow
18 Chief United States District Judge
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